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No. 10-742

In the Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

SURFACE TRANSPORTATION BOARD AND UNITED STATES OF AMERICA; BASIN ELECTRIC POWER COOPERATIVE, INC.; AND WESTERN FUELS ASSOCIATION, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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QUESTIONS PRESENTED

Under 49 U.S.C. §11701(c), an investigative proceeding "is dismissed automatically unless it is concluded by the [Surface Transportation] Board" within three years. In this case, shippers challenged BNSF's coal-transport rates. The Board initially found—prior to expiration of §11701(c)'s three-year deadline—that the shippers had failed to prove BNSF's rates unreasonable. But the Board gave the shippers a second chance to make their case. Over BNSF's objection that the continued proceedings had impermissibly extended beyond §11701(c)'s three-year deadline, the Board considered the shippers' new case, found the challenged rates unreasonable, and ordered more than $300 million in rate relief—by far the largest award ever entered by the STB. On appeal, BNSF argued (inter alia) that the Board's later order was contrary to law under §11701(c). The D.C. Circuit refused to address that substantial challenge, even though it had been raised timely under the Board's own rules and the Board had rejected the argument on the merits. The questions presented are:

1. Whether the D.C. Circuit erred by holding that petitioner's argument challenging agency action was forfeited before the agency, when the agency had resolved the argument on its merits without ever suggesting that the argument had not been properly raised. The D.C. Circuit has joined the Fifth and Eighth Circuits by finding an administrative forfeiture in these circumstances, in square conflict with decisions of the Third, Seventh, Ninth, Tenth, and Federal Circuits.

2. Whether the D.C. Circuit erred in imposing, ex post, its own judicially-created rule of administrative forfeiture not grounded in any statute, rule, or agency practice, in conflict with this Court's decision in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

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ARGUMENT

I.A. The government is not willing to directly endorse the D.C. Circuit's arrogation of the Board's discretionary authority over the timing of agency pleadings. It instead attempts to justify the court of appeals' forfeiture holding on an alternative rationale: that *Chenery* does not apply where "the ultimate result" (if the court were to remand) "is clear." U.S.Opp.8, 10. But it does not argue, and the D.C. Circuit did not purport to hold, that the Board was *required* to find that BNSF forfeited its §11701(c) objection. *Chenery* applies with full force where, as here, the standards for procedural compliance are (indisputably) a matter entrusted to the agency's discretion.[1]

This Court has applied *Chenery* for more than six decades, reaffirming time and again that courts "may not affirm on a basis containing *any element of discretion* ... that is not the basis the agency used, since that would remove the discretionary judgment from the agency to the court." *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (emphasis added); *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 651-52 (1990) ("[I]f an agency's decision is to be sustained in the courts on any rationale [involving] deference, it must be upheld on the rationale set forth by the agency itself."). By its terms, *Chenery* does not require a remand where the ultimate outcome of proceedings is *compelled* by statute or Supreme Court

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[1] The Board did not advance this alternative defense of the opinion in its response to BNSF's petition for rehearing. The Acting Solicitor General now advances it for the first time, after obtaining three extensions of time to respond to the petition.

precedent, such that the agency lacked discretion to reach a different result. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 544-45 (2008) (upholding FERC order on basis raised by agency for the first time on appeal because result was *compelled* by law). But contrary to the government's suggestion, there is no "exception" to *Chenery* that allows a court to affirm on alternative discretionary grounds.

This case presents a paradigmatic *Chenery* scenario: the court of appeals imposed its own equitable judgment, deciding in the first instance the *discretionary* issue of whether BNSF's argument was presented timely under agency practice. Respondents do not contend that the Board was compelled to find a forfeiture. They do not claim that the STB lacked discretion to reach the merits of BNSF's §11701(c) argument. Rather, they suggest that the Board "*would*" exercise its discretion to find a forfeiture (even though it actually did not).[2] That is precisely the

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[2] The government suggests that "WFA might well claim" that a failure to find forfeiture here would be "arbitrary and capricious" in light of the Board's decision in *AEP Texas North Co. v. BNSF Railway Co.*, STB Docket No. 41191 (Nov. 9, 2006). U.S.Opp.9. Beyond having nothing to do with the D.C. Circuit's opinion, which did not cite *AEP Texas*—this argument is both factually and legally baseless. As explained below (at 8-9), the circumstances that drove the Board's forfeiture holding in *AEP Texas* are completely absent here. Moreover, even if the cases were on all fours, an agency may, in its discretion, decline to enforce a forfeiture (Pet.13) or depart from its prior precedents. *FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800 (2009). Respondents do not argue that the Board lacked such discretion. What the Acting Solicitor General believes the agency *might* decide if forced to address the forfeiture argument anew is

sort of judicial conjecture *Chenery* forbids. The agency's "action must be measured by what [it] did, not by what it might have done." *SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943). Sanctioning an exception to *Chenery* in these circumstances would obliterate the rule.[3]

The D.C. Circuit did not purport to apply any exception to *Chenery*. And because no such argument appeared in the responses to BNSF's petition for rehearing, there is nothing to suggest that either the panel or the other members of the D.C. Circuit understand the opinion in that way. *Contra* U.S.Opp.13-14. The D.C. Circuit exercised its own equitable judgment in holding that BNSF did not timely present the three-year dismissal argument to the Board, in direct conflict with *Chenery* and the decisions of other circuits.

B. Respondents concede that the courts of appeals are divided on whether a federal court may find administrative forfeiture in the first instance. They offer no persuasive reason why this case is not a suitable vehicle for resolution of the conflict.[4]

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irrelevant to the question presented, which is whether the *court of appeals* may make that decision in the first instance.

[3] *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (plurality), cited in passing by the government (U.S.Opp.8), does not establish such an exception. In *Wyman-Gordon*, the plurality merely rejected a dissenter's suggestion that *Chenery* required a remand where the adjudicative order under review referred to an invalid rule but was itself indisputably a proper and reasoned exercise of the Board's authority. 394 U.S. at 763-67 & n.6.

[4] WFA suggests that the petition seeks mere error correction, because the D.C. Circuit's opinion cites *Chenery* (and *Tucker Truck*). But this Court routinely grants certiorari in

The government insists that "[m]ost" of the conflicting cases are distinguishable because they involve situations where "the agency was an interested party that failed to raise [a forfeiture] argument in its own defense." U.S.Opp.11-12. But *Chenery* has always applied equally regardless of whether the agency is an "interested" party or is instead functioning as an adjudicating body. *E.g.*, *Gonzales v. Thomas*, 547 U.S. 183 (2006). Indeed, the government acknowledges that its "disinterested-adjudicator" formulation does not dispose of the cases arising from BIA decisions—in which the courts have overwhelmingly refused to find forfeiture when the BIA has addressed the merits of a claim. The government suggests that those cases are not "comparable" to this case because they do not involve *private* interested litigants on both sides. U.S.Opp.13. But that creative distinction also finds no support in this Court's *Chenery* jurisprudence. *See, e.g.*, *Morgan Stanley*, 554 U.S. at 544 (*Chenery* applies to FERC order concerning contract dispute among private parties). Moreover, the Acting Solicitor General offers no reason why the government-as-litigant should be treated worse for these purposes than a private interested party (nor, we expect, would he adhere to that view if pressed).[5]

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circumstances where there was only "perfunctory recognition" of the correct standard. *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2757 (2010). Certiorari is similarly warranted here, because it is plain that the cited precedents have proved too-faint guideposts for several courts of appeals.

[5] WFA identifies an entirely different conflict that is specific to the immigration context—whether the INA, 8 U.S.C. §1252(d)(1), *precludes* federal-court review of issues that have not been exhausted before the agency. WFA.Opp.28-29. That conflict

C. Certiorari is warranted because the influential D.C. Circuit is on the wrong side of a mature circuit conflict about the power of a federal court to affirm agency action based on a supposed administrative forfeiture not found by the agency. This conflict implicates fundamental principles of administrative law that define the relationship between courts and agencies. The circuit split is no less important because the issue arises in a wide variety of contexts, including cases involving the BIA, VA, STB, and Treasury. *Contra* WFA.Opp.27. To the contrary, that demonstrates that the question presented is important and likely to recur frequently. *See, e.g., Chaney v. Heckler*, 724 F.2d 1030, 1030-31 (D.C. Cir. 1984) (Scalia, J., dissenting from denial of reh'g) (noting the administrative law issue to be "of sufficient significance and of sufficiently general application to warrant the attention of the full court," citing SEC, EEOC, and FHA cases, among others), *underlying judgment rev'd, Heckler v. Chaney*, 470 U.S. 821 (1985).[6]

The government ultimately acknowledges that the D.C. Circuit's opinion may be indefensible on its own terms, and suggests that this Court might redress the error with a GVR (for further consideration of

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obviously is not presented here, and BNSF does not ask this Court to resolve it.

[6] In an attempt to cabin the decision below as a mere aberration, the government dismisses *JJ Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041 (D.C. Cir. 2009), as "different" and "not cited below." U.S.Opp.13 n.3. The government sang a very different tune when it relied on *JJ Cassone* on rehearing to assure the court of appeals that the panel's decision was consistent with circuit precedent holding that administrative forfeiture issues are not "entrusted solely" to the agency. U.S.Reh'g Resp.10.

Chenery, presumably). U.S.Opp.15. *But see Webster v. Cooper*, 130 S.Ct. 456 (2009) (Scalia, J., dissenting). The D.C. Circuit was well aware of *Chenery*, but (like the Fifth and Eighth Circuits) apparently views *Chenery*'s mandate as merely precatory. We therefore believe the more appropriate disposition would be a grant for plenary review or summary reversal instructing the D.C. Circuit to decide the merits of BNSF's statutory challenge to the Board's orders.[7]

II.A. The D.C. Circuit's assertion of authority to declare an administrative forfeiture based on nothing more than its own assessment of the equities also warrants certiorari because it fundamentally misapprehends the limited role of a reviewing court. Under *Vermont Yankee*, a federal court is not free to "impose upon the agency its own notion of which procedures are 'best.'" 435 U.S. 519, 549 (1978).

Respondents argue that *Vermont Yankee* is not controlling, because the court of appeals affirmed, rather than invalidated, the Board's decision. U.S.Opp.11; WFA.Opp.23.[8] They are mistaken.

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[7] The Court should also decline the government's suggestion (U.S.Opp.10 n.2) to invite the D.C. Circuit to remand the forfeiture issue to the Board. If WFA believed the Board to be compelled to find a forfeiture, it should have argued forfeiture as an alternative basis for affirmance in its brief in the court of appeals. WFA chose not to do that, and it is in no sense "unfair[]" (WFA.Opp.30) to restrict it now to the arguments it made on appeal. Moreover, an agency that has addressed the merits should not have a second opportunity—with the benefit of having gauged a panel's reaction to its merits decision—to reconsider whether to exercise its equitable discretion to declare a forfeiture. *See* Pet.16-20.

[8] Nor does Board counsel's decision to ride the forfeiture bandwagon at oral argument save the court of appeals' ruling. *See*

Vermont Yankee stands for the general proposition that "the [APA] sets forth *the full extent of judicial authority* to review executive agency action for procedural correctness." *Fox*, 129 S.Ct. at 1810 (citing *Vt. Yankee*, 435 U.S. at 545-549). That fundamental principle of administrative law has never been limited to situations where the court is invalidating agency action.

The government also contends that the D.C. Circuit did not violate *Vermont Yankee* because the court merely enforced the Board's own forfeiture precedent, which the Board *would* have applied had it focused on the issue. But it is perfectly clear that the D.C. Circuit did not purport to enforce any Board precedent (Pet.App.16a-17a), and equally clear that under the Board's rules and practice BNSF's argument was timely raised.

1. Respondents rely principally on the Board's decision in *AEP Texas*, insisting it is factually "identical" to and "precisely the same" as this case (U.S.Opp.5, 9), and arguing that it demonstrates that the D.C. Circuit's forfeiture holding was (unwittingly) consistent with Board practice. Respondents understandably did not cite *AEP Texas* when they were pressed at oral argument to explain why BNSF's §11701(c) argument should be declared forfeit, and the D.C. Circuit rightly did not rely on it, because the facts that led the Board to find a forfeiture in *AEP Texas* are absent here.

In *AEP Texas*, the Board held that the railroad "waived" its §11701(c) argument "through its course of

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Morgan Stanley, 554 U.S. at 568; *FPC v. Texaco Inc.*, 417 U.S. 380, 397 (1974).

conduct." JA-265. The Board found that the railroad had agreed to a procedural schedule (prior to expiration of the three-year period) that would extend proceedings beyond the three-year deadline, represented that the extended schedule would not prejudice AEP, and then moved to dismiss AEP's complaint in the midst of that agreed-upon schedule before the Board could render *any* decision on its case. In those circumstances, the Board found that the railroad could not argue for dismissal under §11701(c), because it had "induced" or "tricked" the complainants "into allowing [the] deadline to pass." JA-265 (citations omitted).

This case is different in all critical respects. Here BNSF cannot be accused of having lulled the complainants or the Board into adopting a schedule that transgressed the three-year deadline. The original proceedings culminated in the 2007 Order, within three years. Later, after WFA had elected to continue the proceedings and the three-year period had already expired, BNSF agreed to a procedural schedule for those renewed proceedings. *See* Add.1a-5a (Oct. 22, 2007 Notice proposing procedural schedule).[9]

And, contrary to the Board's finding in *AEP Texas*, BNSF never represented that WFA would not be prejudiced by the Board's decision to hold proceedings in abeyance pending *Major Issues*. *Contra* U.S.Opp.4, 9-10. BNSF's filing in *Major Issues* (reproduced

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[9] BNSF consistently argued that if proceedings continued beyond October 19, 2007, the continued proceedings would have to be treated as a new case and any rate relief would therefore have to be prospective. *See, e.g.*, Pet.App.34a-35a.

herein, Add.6a-9a) simply acknowledged the utilities' prejudice argument and countered that they were ignoring the many offsetting *benefits* of the rulemaking. Add.8a. Indeed, at oral argument, the Board explicitly disclaimed any "suggest[ion] that [BNSF] caused the Board to hold this case in abeyance." Add.13a.

Even with the delay resulting from *Major Issues*, the Board rendered a decision on WFA's initial case with about a month to spare on the three-year deadline, having considered WFA's supplemental evidence, which was designed to conform with the new *Major Issues* rules. Enforcement of the three-year deadline, therefore, would not have deprived WFA of due process (*contra* WFA.Opp.10, 15, 32); it simply would have prevented the Board from giving WFA a do-over that even the Board believed was a gratuitous gesture. Pet.App.26a.[10]

2. Respondents also suggest that the Board's 2007 Order required BNSF to raise its §11701(c) argument in a petition for reconsideration of that

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[10] For that reason, WFA's reliance on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), is entirely misplaced. And the Board never found (*contra* WFA.Opp.11) that due process required that WFA have a second opportunity to prove its case. *See* Pet.App.26a; Pet.App.36a; JA-615. To the contrary, the Board explained in *Major Issues* that applying the new rules to this case did not upset WFA's "settled expectations." JA-251. The Board gave WFA ample "notice and an opportunity to offer evidence bearing on the new standard" when it informed WFA in *February 2006* that the new rules would apply to its case. *BNSF Railway Co. v. STB* ("*Major Issues*"), 526 F.3d 770, 784 (D.C. Cir. 2008). And, until it learned in September 2007 that it had lost, WFA never asked for an opportunity to redesign its case, much less argue that due process so required.

order. U.S.Opp.10; WFA.Opp.18. Beyond (once again) having nothing to do with the D.C. Circuit's actual holding, this suggestion is also meritless. The 2007 Order stated that "[p]arties should use the 20-day reconsideration period to identify technical or substantive errors ... *based on the record developed to date*," Pet.App.31a n.28, because the parties would not be permitted to use the continued proceedings to "relitigate" issues that had been decided and were not affected by *Major Issues*. Pet.App.31a. Of course, the §11701(c) issue had not been litigated or decided by the Board at that point, since the Board was on track to render a final decision in the case within three years. Indeed, the Board further specified that the 2007 Order would be treated as final and proceedings "discontinue[d]" unless WFA elected within 30 days to continue proceedings and supplement its case. Pet.App.31a. As noted above, WFA did not elect to extend proceedings until October 22, *after* the three-year deadline and the reconsideration period had passed. Add.1a-5a. WFA's decision (in late October 2007) to submit a revised case was therefore not an error "based on the record developed" as of September 2007. Pet.App.31a n.28.

B. The government urges this Court not to worry about the D.C. Circuit's arrogation of agency authority because the "circumstances of this case ... are relatively unique" (U.S.Opp.13), and the Board can still "formulate and apply its own timeliness rules in future cases" (U.S.Opp.11). That assurance is cold comfort, since the D.C. Circuit may apparently decide in any particular case to exercise its own equitable judgment—with no prior warning to litigants in the administrative process as to whether they are

presenting their arguments to the agency with sufficient haste.

III. The D.C. Circuit's decision warrants this Court's review because, in conflict with *Chenery* and *Vermont Yankee*, it upsets the fundamental balance of powers between agencies and federal courts, and exacerbates a significant and mature circuit split. This case is a suitable vehicle because there are no threshold issues that could thwart this Court's resolution of the important administrative law questions presented.

Respondents nevertheless suggest that this Court should take a pass because, regardless of whether its argument was improperly defaulted, BNSF will eventually lose on the merits. To the extent the merits of the underlying statutory issue (not before the Court) are relevant, they weigh in favor of granting certiorari. The statute is not susceptible to the Board's interpretation, for reasons explained in the petition (Pet.7-8) and at length in BNSF's briefing in the D.C. Circuit. Indeed, at least two members of the panel—Judges Garland and Henderson—were openly skeptical of the Board's counter-textual interpretation. Add.10a-13a. BNSF should not have been denied review of its challenge to the Board's $300 million reparations order because a panel of the D.C. Circuit felt, subjectively, that BNSF waited too long to assert its rights.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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ADDENDUM

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Supplemental Evidence Notice of Western Fuels Association, Inc. and Basin Electric Power Cooperative, *Western Fuels Association, Inc. v. BNSF Railway Co.*, STB Docket No. 42088 (Oct. 22, 2007) 1a

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BEFORE THE
SURFACE TRANSPORTATION BOARD

WESTERN FUELS ASSOCIATION, INC. and BASIN ELECTRIC POWER COOPERATIVE, INC.	)	
Complainants	)	Docket No. 42088
v.	)	
BNSF RAILWAY COMPANY	)	
Defendant.	)	

SUPPLEMENTAL EVIDENCE NOTICE

Pursuant to the Board's decisions served in this proceeding on September 10, 2007 and September 26, 2007, Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively "WFA/Basin") hereby notify the Board that they wish to submit supplemental stand-alone cost ("SAC") evidence.[1] WFA/Basin request that the Board adopt the proposed procedural schedule set

[1] Nothing in this Notice should be construed as a waiver of WFA/Basin's objections to the Board's actions in this case. These objections remain ongoing.

forth in Attachment 1 to govern the submission of supplemental SAC evidence.

WFA/Basin's proposed procedural schedule does not permit any supplemental discovery. WFA/Basin are amenable to this approach provided that the Board directs that the parties' supplemental evidence be limited to the use of material already in the administrative record (including the discovery record) as well as any other public or commercial material that is equally available to each side without discovery against the other.

As the Board knows, SAC changes of the type permitted under the Board's September 10, 2007 decision will be complex, time-consuming and very expensive for WFA/Basin. Additional discovery will greatly add to this complexity, delay and expense. However, as the Board also knows, most data needed to present a SAC case is confidential or highly confidential data possessed by the defendant earner, here BNSF Railway Company ("BNSF"). WFA/Basin must not be prejudiced by BNSF"s selective presentation in BNSF"s supplemental evidentiary filings of new confidential or highly confidential internal BNSF data. WFA/Basin address this concern by their proposed evidentiary limitation. If the Board does not grant WFA/Basin's requested limitation, WFA/Basin request that the Board adopt the procedural schedule set forth in Attachment 2.

Respectfully submitted,

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Dated:
October 22, 2007

Attachment 1

PROPOSED PROCEDURAL SCHEDULE

Date	Event
Day 0	Date of service of STB decision *adopting procedural schedule*
Day 60[1]	WFA/Basin's opening third supplemental SAC evidence due
Day 105	BNSF's reply third supplemental SAC evidence due
Day 135	WFA/Basin's rebuttal third supplemental SAC evidence due
Day 210	STB final decision due

[1] If Day 60 falls between December 24, 2007 and January 1, 2008, this due date shall be extended to January 7, 2008, with all subsequent dates adjusted accordingly.

Attachment 2

PROPOSED PROCEDURAL SCHEDULE

Date	Event
Day 0	Date of service of STB decision adopting procedural schedule; Discovery period begins[1]
Day 45	Discovery period ends
Day 105	WFA/Basin's opening third supplemental SAC evidence due
Day 150	BNSF's reply third supplemental SAC evidence due
Day 180	WFA/Basin's rebuttal third supplemental SAC evidence due
Day 255	STB final decision due

[1] Initial discovery responses and objections will be due 5 business days after service of the requests. Any motions to compel will be due 5 business days thereafter. These motions will be handled under the Board's discovery procedures set forth at 49 CFR 1114.31(a), except that a reply to a motion to compel will be due 5 business days after receipt of the motion.

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 657 (Sub-No.1)

MAJOR ISSUES IN RAIL RATE CASES

BNSF RAILWAY COMPANY'S
REPLY TO PETITION FOR RECONSIDERATION

BNSF Railway Company ("BNSF") hereby replies to the Joint Petition for Reconsideration of Western Fuels Association, Inc. ("WF A"), Basin Electric Power Cooperative, Inc. ("Basin"), Kansas City Power & Light Company ("KCPL") and Western Coal Traffic League ("WCTL"), filed on March 20, 2006 in the above-captioned proceeding.

As discussed more fully below, BNSF supports the Board's efforts to address important issues of SAC methodology through a rulemaking proceeding. While BNSF is not in favor of all of the changes proposed by the Board, BNSF nevertheless urges the Board to follow through with the proposed rulemaking so that its future application of SAC methodology may better conform with the statutory objectives and economic principles underlying the *Coal Rate Guidelines*.

ARGUMENT

I. RULEMAKING IS A FAIRER AND MORE EFFICIENT MEANS OF ADDRESSING RECURRING ISSUES OF SAC METHODOLOGY THAN CASE-BY-CASE ADJUDICATION

Petitioners request that the Board terminate the rulemaking proceeding and continue to develop rules governing the application of the SAC test on a case-by-case basis. They claim that the decision to convene a rulemaking proceeding on SAC issues is contrary to the wishes expressed by shippers participating in the April 2005 hearing in Ex Parte No. 657, *Rail Rate Challenges Under the Stand-Alone Cost Methodology*. They assert that SAC issues should be addressed only in the context of individual cases. Petition at 2-3. They further claim that the decision to convene a rulemaking proceeding "prejudices the interests of parties such as WFA/Basin and AEP Texas North Company" that have already presented evidence and argument on their rate reasonableness claims. *Id.* at 4.[1] They complain about the burden of submitting new evidence and argument in cases where significant expenditures of time and effort have already been made and they complain about the delay that will result from a stay of the cases while the rulemaking proceeding is pending. *Id.* at 6-7.

None of petitioners' complaints constitutes an assertion of material error that would justify a reversal

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[1] Although Petitioners refer to the pending rate case in which AEP Texas is a complainant, AEP Texas is not a party to the petition, nor is it a member of Petitioner Western Coal Traffic League.

of the Board's decision to institute a rulemaking proceeding to address major issues of SAC methodology. The decision to open a rulemaking proceeding on the subject of SAC methodology is within the Board's sound discretion. It is entirely rational for the Board to conclude that recurring issues of SAC methodology that potentially affect multiple current and future litigants are best addressed through a rulemaking proceeding than through case-by-case adjudication. As BNSF noted in the testimony it submitted in the April 2005 Ex Parte No. 657 hearing, the *Coal Rate Guidelines* have been in place for 20 years and they have not been revisited since they were adopted. The *Guidelines* are based on sophisticated economic principles. Experience has shown that the application of those principles exclusively through case-by-case litigation has produced standards that diverge from those underlying principles. The *Guidelines* themselves recognized "that the workability of the *Guidelines* is most appropriately evaluated in light of experience." *Guidelines* at 525. The Board has appropriately determined that the time has arrived to carry out that evaluation.

While Petitioners claim prejudice in that individual litigants will experience some delay in the resolution of their cases, they ignore the potential benefits of rulemaking for a broader class of actual and potential litigants. Rulemaking can yield greater clarity regarding the application of SAC standards going forward than case-by-case litigation and thereby foster private resolution of disputes. It is also a fairer way of formulating rules than case-by-case litigation because it allows participation by all potentially affected parties.

It is particularly appropriate that there be a focused assessment of the application of maximum rate standards for coal transportation given the current state of coal transportation markets. Demand for coal transportation is at an all-time high and is projected to increase dramatically. At the same time, rail capacity is constrained and new investments are needed to expand capacity and improve service for the entire community of shippers served by the nation's freight railroads. The Board's application of its rate reasonableness standards should be considered against these new realities of the market. The proposed rulemaking will give all persons potentially affected by the Board's rate reasonableness standards an opportunity to present their views on how the Board's application of these standards will affect the critical real world issues of infrastructure needs and service quality.

For the foregoing reasons, BNSF urges the Board to deny the Petition for Reconsideration and to conduct the rulemaking proceeding that it initiated with its February 27, 2006 order.

Respectfully submitted,

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April 10, 2006

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BNSF Railway Company, Petitioner, v. Surface Transportation Board, et al., Respondents.	No. 09-1092, et al.

Thursday, February 18, 2010

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

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[MR. LIGHT]

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Turning to the construction of 10701 -- 11701, the basic question is did Congress intend to require the automatic dismissal of complaint-based proceedings that are not resolved in three years, and the answer is no. First, the statutory language does not compel that result. The term formal investigative proceeding by itself is not clear and [38] unambiguous, it's not defined

in the statute, and it's not used elsewhere in the statute. And the reference to subsection A doesn't clear things up. Through th [sic] exception clause, subsection A clearly encompasses both agency-initiated investigations and complaint-based investigations. Moreover, subsection A specifically recognizes that both types of these investigations are authorized under other specific provisions of the Act.

I think one way of looking at this, Your Honors, is that subsection A would mean the same thing if it said except as authorized by Section 10745, Section 11323, et cetera, et cetera, et cetera, the Board may begin an investigation only on complaint. And in that case I think it would be clear that subsection A encompasses both agency-initiated and board-initiated investigations.

JUDGE GARLAND: But what would make it that only the board-initiated is formal?

MR. LIGHT: Well, Your Honor, I'm not suggesting that it is clear and unambiguous that that is the only interpretation of subsection A. What I'm suggesting is subsection A is ambiguous, and therefore the Board is entitled --

JUDGE GARLAND: What makes it ambiguous that there's a difference between those two? If A said the Board can initiate investigations either on its own or on complaint, and **[39]** part C says formal investigation authorized under this section has to be done in three years, what's ambiguous about the fact that both of those have to be done in three years? Unless there's something that makes one formal and the other not.

MR. LIGHT: Because the term formal investigative proceedings is ambiguous. It could be referring to --

JUDGE GARLAND: Could be ambiguous, but what makes it apply to one rather than -- what makes it ambiguous in the sense that it only applies to a Board-initiated rather than complaints?

MR. LIGHT: Well, there's --

JUDGE GARLAND: Is there anything more formal about a Board-initiated proceeding than a complaint-initiated proceeding?

MR. LIGHT: I don't know about that, Your Honor. But I think the basic point is that it could refer to either of them, and since we don't know which one it does refer to, the agency is entitled to construe the ambiguity.

JUDGE GARLAND: Well, it suggests that it doesn't apply to both of those.

JUDGE HENDERSON: Yes.

JUDGE GARLAND: Why is it unclear that it doesn't apply to both of them under the circumstances you're talking about?

MR. LIGHT: Because since we don't know what it does [40] apply to it could apply to either. And, I mean, I agree, it could apply to both, but it could apply to either, and since it could apply to either one or the other, the agency is entitled to interpret it in a way to avoid serious constitutional difficulties.

JUDGE GARLAND: Are the words formal investigative proceeding referred to anywhere else?

MR. LIGHT: No.

JUDGE ROGERS: How about in the regulations? Is it defined anywhere?

MR. LIGHT: I don't believe so, Your Honor.

JUDGE ROGERS: Yes.

MR. LIGHT: And because the --

JUDGE HENDERSON: Let me ask you so I'm clear, so you're saying that it can refer to either, including one brought by the Commission on its own initiative, even after '95 when that language is omitted is because of the savings language in subsection A?

MR. LIGHT: If I understand your question yes, it could have been interpreted as applying to either or both, but the Board interpreted it as applying to agency --

JUDGE HENDERSON: Okay, that's before '95. Then in '95 the initiative, your own initiative language is excised, so now -- I just want to find out if I'm understanding your position -- now you say that doesn't make any difference even [41] though they excised that because of the savings provision at the beginning of A?

MR. LIGHT: The except as otherwise provided, correct.

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MR. LIGHT: And we're not suggesting that BN caused the Board to hold this case in abeyance, but what I'm suggesting is that there are situations where, you know, a railroad would have, under BN's interpretation would have the incentive to try and do that.

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